SUPREME COURT, U.S.
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87-2003

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ALEJANDRO HERNANDEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED

Whether a non-testifying co-defendant's statement, introduced at a joint trial, falls under the *Bruton* exception to the general principles governing curative jury instructions when the statement has been redacted by the use of neutral terms so that it is not facially incriminating.

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 121 Ill. 2d 293, 521 N.E.2d 25, 34 (1988) (See Appendix A). The order of the Illinois Supreme Court denying rehearing is not reported but is attached hereto (See Appendix B).

JURISDICTION

The opinion of the Illinois Supreme Court was filed on January 19, 1988. A timely petition for rehearing was filed

by petitioner. On April 5, 1988, an order denying the petition for leave to appeal was entered.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3). The instant petition for writ of certiorari is filed within 60 days of the Illinois Supreme Court's order denying rehearing. United States Supreme Court Rule 20; 28 U.S.C. section 1257(3). The decision of the Illinois Supreme Court was premised upon federal constitutional grounds and does not rest upon any independent state ground.

STATEMENT OF THE CASE

On the afternoon of February 25, 1983, ten year old Jeanine Nicarico was abducted from her parents' Naperville home. Within hours Jeanine was raped, subjected to deviate sexual assault and beaten to death with a blunt instrument. Two days later Jeanine's body was discovered in an isolated area near her home. On March 9, 1984, Alejandro Hernandez ("respondent"), Rolando Cruz and Stephen Buckley were charged by indictment with murder, rape, deviate sexual assault, aggravated indecent liberties, residential burglary, home invasion and aggravated kidnapping based on the criminal conduct against Jeanine. (R.C. 1-12)

Following numerous pre-trial motions the cause proceeded to a joint jury trial. The prosecution's theory of the case was that, after the three defendants committed the crime, respondent made a series of admissions to friends and law enforcement personnel in which he claimed that a man named "Ricky" confessed to the crime. Over time, respondent included more details and finally admitted his role

in the crime. In addition, respondent confessed to his long-time friend Armindo Marquez. (R. 3369)

The defense theory of the case was that respondent made a series of false statements to the police in an effort to collect reward money. In addition, respondent took the position that he did not make inculpatory statements to his friends.

At trial, Patricia Nicarico, Jeanine's mother, testified that on the day of the murder Jeanine was sick and stayed home from school. (R. 3474-75) At noon, Mrs. Nicarico went home and made lunch for Jeanine. (R. 3478, 3526) Mrs. Nicarico told Jeanine to keep the door locked and not to open it for anybody. (R. 3482) Mrs. Nicarico returned to work at 12:30 p.m. (R. 3481) The door was locked at that time. (R. 3482) Jeanine was wearing a nightshirt which showed a picture of a dwarf and said "I am sleepy." (R. 3482) She also wore a pair of polka dot panties. (R. 3482)

At approximately 1:00 p.m. Jeanine called Mrs. Nicarico at work and they talked about a television show. (R. 3484) This was the last time that Mrs. Nicarico spoke with Jeanine.

Kathy Nicarico, Jeanine's fifteen (15) year old sister, testified that when she left for school on the morning of February 25 her bed was "sloppily made." (R. 3434) Covering the bed was a fitted sheet, a flat sheet, an electric blanket, a bedspread and a security blanket. (R. 3433)

Later that day Kathy returned home from school. (R. 3435) She noticed that the storm door on the front entrance was closed and the wooden door, located inside it, was open. (R. 3436) The molding around the door was "hanging out" from the door frame. (R. 3436) (Evidence technicians later processed and photographed long streak marks made by a small hand along the inside wall leading

to the doorframe beneath the separated molding. The streak marks were about three feet above the floor.) Kathy went inside the house and called for Jeanine. (R. 3437) She noticed that the television set located in the family room was on. (R. 3438) When there was no answer, she became scared and went to the home of Diane Dirksen, a neighbor, where she explained that Jeanine was missing and that someone might have broken into the house. (R. 3437) Kathy testified that these events occurred between 3:00 and 3:05 p.m. (R. 3450)

Kathy and Mrs. Dirksen returned to the Nicarico home and searched for Jeanine, but failed to locate her. (R. 3440, 3458) Kathy noticed that the condition of her bedroom was different than it had been when she left for school that morning. (R. 3443) Specifically, the items located on top of her bed were moved and a sheet and security blanket were missing. (R. 3445-48, 3450) The security blanket was a faded pink color and had round circles embroidered on it. (R. 3449)

Ms. Dirksen telephoned Jeanine's mother and explained the situation. (R. 3458-59) She then continued to search for Jeanine. (R. 3459-60) She recalled that when Mrs. Nicarico arrived at home, she looked for Jeanine and then called the police. (R. 3461)

Naperville Police Officer John Bootz testified that at 3:25 p.m. on the day of the kidnapping he responded to a call and went to the Nicarico home. (R. 3547-48) He examined the front door and noticed a large bootprint located slightly to the left and under the door handle. (R. 3549) (Expert testimony offered by the prosecution at trial concluded that the bootprint was made by the boot of Stephen Buckley, one of the respondent's friends.) The authorities began an extensive search in the hope of finding Jeanine alive. This effort proved to be unsuccessful.

Mrs. Nicarico recalled that, at 3:15 p.m., after receiving a call from Diane Dirksen, she left work and went home. (R. 3489) After looking around the house she called the police. (R. 3490)

On the evening of February 27, the police informed the Nicaricos that they had located Jeanine's body. (R. 3514-15) On the next day Mr. and Mrs. Nicarico identified Jeanine. (R. 3515-16)

Mrs. Nicarico testified that she had hired a cleaning woman named Janie Ruiz. (R. 3518, 3533) Mrs. Ruiz had cleaned the house twice before Jeanine's murder. (R. 3519-20)

Mrs. Nicarico also testified that on the day of the crime a sailboat was parked in the driveway. (R. 3540)

Chris Nicarico, Jeanine's sister, testified that she provided the police with a list of persons who were in the house on Friday so that their fingerprints could be eliminated. (R. 3820)

Tom Nicarico, Jeanine's father, testified that many different people were in the house during the year preceding Jeanine's murder. (R. 3854) He also described a black gas lantern which was located in the front yard of the Nicarico home. (R. 3832)

On the afternoon of February 27, 1983, Charles Bryant, Kerry Morrick and Morrick's young son were walking through some woods near Eola Road and I-5 when they discovered Jeanine's body. (R. 3846, 3848) They left the area, returned with a friend and then asked someone at a nearby house to contact the police. The police arrived and decided to wait until morning before moving Jeanine's body in order to process the crime scene. (R. 3909)

Dr. Frank Cleveland, the Hamilton County, Ohio, coroner, performed an autopsy on Jeanine's body. (R. 4317) Dr.

Cleveland testified that he had performed over 10,000 autopsies and supervised between 10,000 and 15,000 additional autopsies. (R. 4312)

Dr. Cleveland noted that Jeanine was 4'3" tall and weighed 65 pounds. (R. 4320) Toweling covered the front and left side of her face, including her eyes and nose. The toweling was bound around Jeanine's head with adhesive tape and was "firmly attached." (R. 4320, 4335) Jeanine wore only a nightshirt, which was slit the entire length of the right side. (R. 4341)

Dr. Cleveland testified that Jeanine died from massive trauma to the head caused by a blow or blows struck with a blunt instrument. (R. 4350-51) Jeanine sustained two blows to the front of her head. (R. 4320) One blow, struck to the left side of her head, caused a huge laceration. As a result of the blow, "[t]he entire skull was split and separated up to a quarter of an inch. . . ." (R. 4325) This split ran from just above Jeanine's nose to the base of her skull. (R. 4325) Jeanine had other facial injuries, including a broken nose, a complete laceration of her upper lip and severe bruising of her lower lip. (R. 4336) She also sustained hemorrhaging to the eyelids. (R. 4349)

Jeanine also sustained at least three blows to the back of the head. (R. 4353) These blows were struck with a "phenomenal amount of force" (R. 4353), and each one was sufficient to cause death. (R. 4340) It was impossible for Dr. Cleveland to determine the order in which the blows were struck. (R. 4340-41)

Dr. Cleveland testified that the "magnitude of the force used [against Jeanine] was huge." (R. 4327) He also characterized it as "an enormous force." (R. 4327) He noted that the outer table of Jeanine's skull had separated from the inner table, the first time he had seen such an injury. (R. 4326-27) One of the blows to the back of Jeanine's

skull fractured the coronal suture, an injury which Dr. Cleveland had previously observed only in airplane crash cases. (R. 4333)

Dr. Cleveland testified that Jeanine's thighs were bruised and that blood was coming from her vagina. He noted that the "entire vaginal tract was hemorrhagic." (R. 4336-37) Based on this evidence it was Dr. Cleveland's opinion that Jeanine was raped. (R. 4337)

It was further established that Jeanine had sperm and seminal fluid in her rectum. (R. 4579)

Dr. Cleveland noted that the lividity in Jeanine's body indicated that it was at the spot where it was finally discovered for some period of time (R. 4364), although the precise period of time was impossible to determine. (R. 4360)

As part of the investigation, DuPage County authorities contacted E. Stephen Townsend, a canine handler with the Lake County Sheriff's Police. (R. 3728) Townsend and his partner went to the Nicarico residence with two bloodhounds. One of the dogs detected Jeanine's scent near the front door and followed it down the driveway for a distance of approximately twenty (20) feet, where it ended. (R. 3749, 3773-74)

The dog also followed a trail from the bootprint on the front door to a depression in the ground located approximately eight feet away and then to another footprint and "the picture window side of the residence." (R. 3752, 3757-58)

On the morning of February 28, Deputy Townsend went to the area where Jeanine's body was found. (R. 9178) One of the dogs followed Jeanine's scent from a point near the intersection of the Prarie Path and Eola Road to the spot where her body was found. (R. 9180, 9182, 9186) The

other dog followed a scent from that spot up an incline, across the road and to a spot near a bush where a piece of denim was previously located. (R. 9183) The dog following the scent of the denim went to a turn-around area, where he lost the scent. (R. 9184) The dog's actions indicated that the scent was from an automobile. (R. 9193)

Haydee Hernandez, respondent's mother, testified that at the time of the murder she lived with respondent in a house located on North Ohio Street in Aurora. (R. 4618, 4620-21) At the time Mrs. Hernandez recalled that during late March she spoke with respondent about a murder. (R. 4623-25) At the time Mrs. Hernandez thought respondent might be talking about the Nicarico murder. Mrs. Hernandez was unaware that a reward had been offered for information in the case. (R. 4642) Respondent said that he passed a Jewel supermarket when some friends asked him to join them for a beer. (R. 4625) Respondent stated that, during a conversation which followed, a man who respondent did not know said, "[h]e don't [sic] want to kill her but he killed her because she started screaming." (R. 4626) Respondent stated that the man was a friend of those persons who invited him to have a beer and further stated that he would be able to identify him. (R. 4629, 30, 32)

Mrs. Hernandez testified that she and respondent agreed that they had to do something about what respondent heard. (R. 4627) On the following day respondent agreed to talk with his uncle, Wilfredo Estremera. (R. 4628)

Wilfredo Estremera testified that during the first two weeks of March, 1983, respondent said, "Uncle, you know what? I know the guy that killed the little girl in Naperville." (R. 4648) Respondent went on to identify this man as a person named Ricky. (R. 4648) According to respon-

dent, Ricky drove a green and gold car. (R. 4649) Respondent described Ricky as "a white boy [who] hangs out in Aurora, and [ ] is from Oswego." (R. 4650) Ricky told respondent "that he had killed her, that he didn't want to do so but she had it coming anyway." (R. 4649) Ricky did not state why the victim "had it coming," but said that the victim had started crying. (R. 4651) Ricky said that he was sorry he had killed the little girl. (R. 4652)

Respondent told Estremera that he had not called the police because he was afraid of being killed. (R. 4653) Respondent declined Estremera's offer to take him to the police. (R. 4654)

Detective John Sam testified that he and Detective Kurzawa spoke with respondent on March 14. (R. 4854) The detectives told respondent that they received an anonymous call indicating respondent knew about Jeanine's murder. (R. 4857) Respondent first denied knowing anything about the murder, but later said that he was in an automobile with Steve Buckley, Mike Castro and a man named "Ricky Benevides." Respondent said that "Ricky" was from Oswego. (R. 4858) "Ricky" said that "he killed the little girl in Naperville." (R. 4858)

Respondent told the detectives that Ricky said he was going to "rip-off" a house for money. Respondent said that "Ricky" went from town to town committing burglaries. (R. 4907) "Ricky" associated with a man named Frankie Delgado. (R. 4907)

Armindo Marquez testified that he had known Hernandez since they were in kindergarten. (R. 5297) In March of 1983 Marquez was in the Kane County Jail when the police spoke with him as part of the investigation in this case. (R. 5301) Marquez was taken to a building next to the jail and placed in a room with Hernandez. (R. 5303)

Marquez was not told that he might receive a reward for doing anything in regard to this case and he never asked the police about a reward. (R. 5386) Marquez spoke with Hernandez and asked him if he was involved in murdering Jeanine. (R. 5305) Hernandez stated that he knew who committed the crime. He identified a police photograph as a person named "Ricky," but said that he was going to falsely give the police that name. He said that he did not want to tell the police the true identities of the persons involved. (R. 5305) Respondent later said that Marquez knew the "real guys," but refused to disclose their names, "because he said if he were to give their names, he would get shot." (R. 5306)

Respondent told Marquez that, on the day in question, he "dropped his partner off, went around the block once and pulled up in the driveway." (R. 5306-07) Respondent went on to say that, "his partner dragged the girl out of the house by her ankles." (R. 5306) He recalled that a night light located in the front of the house bothered him. (R. 5308) They took the girl to an abandoned place where they killed her because "she was making too much noise." (R. 5307) Respondent recalled that "[s]he kept on screaming, wanting to go home." (R. 5307)

Respondent admitted that "he used something to tie her eyes with and then he held her and the other guy hit her." (R. 5307) The weapon used was a bat. (R. 5313) The men then dumped the body and "stomped on the back of her head." (R. 5307-08)

Assistant Kane County State's Attorney Thomas Sullivan testified that Marquez's sentence for burglary in Kane County was not influenced by his cooperation in the present case. (R. 6428) Sullivan did not communicate with authorities in DuPage County prior to Marquez's plea. (R. 6430) He further testified that Marquez did not request

any consideration in exchange for his cooperation. (R. 6429)

On August 18, 1983, Jackie Estremera, respondent's sixteen (16) year old cousin, was called to testify before the Grand Jury investigating Jeanine's murder. He denied any knowledge concerning the crime. Estremera testified again on October 6, and again indicated that he knew nothing about the crime. Two days later Estremera told Hernandez that he had been called to testify and asked Hernandez "what was going on?" Respondent replied that he knew who killed Jeanine and that "he wasn't going to say nothing [sic] unless he got money." (R. 4712)

Respondent went on to tell Estremera that he and others had planned for a long time to rob the house in Naperville (identified as the Nicarico residence) because the houses there contained "better things to steal." (R. 4720-21) On the day in question, Hernandez and the other persons "were all messed up on paint," (R. 4714, 4717) meaning that they had used the drug toluol in the form of glue. (R. 4723) They left and went to the Nicarico house and, while respondent stayed in the car, the others went up to the front door. (R. 4717-18) These persons then kicked the door in. (R. 4718) Respondent stated that the person who did it was in California. (R. 4718) They took a "little girl" who was inside the house because they were afraid that she would recognize them if the police showed her their photographs. (R. 4720, 4722-23) The men had not expected to find the girl inside. (R. 4722) Respondent was crying during this conversation. Estremera had never seen respondent cry before. (R. 4746)

Estremera subsequently was arrested for failing to appear before the Grand Jury. The prosecutor told Estremera that if he did not cooperate he would stay in jail for the weekend. (R. 4740) Estremera later agreed to talk

with respondent after being fitted with a microphone by the police. (R. 4724) The prosecutor gave Estremera a list of questions to ask respondent. (R. 4736) On October 28, respondent again had a conversation with respondent. Estremera told respondent about the microphone because he did not want respondent to get in trouble. (R. 4725) Estremera testified that he did not feel that he should get a reward for the information provided in this case.

Arthur Lee Burrell testified that he was serving a prison term in the Illinois Department of Corrections. (R. 6194) He met Cruz in 1979 and that the two men became "like best friends." (R. 6303, 6304, 6220) Burrell dated Cruz's sister "a couple of times." (R. 6237) Burrell had seen respondent on the Prarie Path "about three or four times a month." (R. 6204) Burrell considered the Prairie Path area between Eola Road and I-5 to be the "most popular" place to have parties between 1979 and 1983. (R. 6206-6207)

While incarcerated on an earlier conviction, Burrell received a series of five letters from Cruz. (R. 6208) Cruz indicated in one letter that Naperville was a new area and that "there was no police." (R. 6212) Specifically, Cruz indicated that the area was close to Naperville North High School and an A&P grocery store. (R. 6212) After being released from prison Burrell was convicted of residential burglary. He believed that Cruz gave the police information leading to that conviction. (R. 6230)

Burrell also testified that he had known respondent for a number of years. (R. 6197) At the time of trial Burrell was serving a prison term for residential burglary. (R. 6194-95, 6229)

Burrell was familiar with the area known as the Prarie Path. (R. 6198) He and respondent built a clubhouse in the area and went there on a regular basis between 1977

and 1981 in order to "party." During 1980 and 1981 Burrell considered respondent to be "like a brother." (R. 6213) Burrell last saw respondent in 1981. (R. 6215) He recalled that respondent carried a nightstick. (R. 6216)

Jimmy Ellis was the supervisor of the Fox Valley Community Correctional Center, a work release center. (R. 6352-6353) He testified that Arthur Burrell checked into the center on February 21, 1983, and was released at 11:40 p.m. on February 25, 1986. (R. 6359)

Ramon Mares testified that he was Cruz's distant cousin and good friend. The two men grew up together. Mares held no grudge against Cruz. (R. 5259) (R. 5200) In March of 1983 (approximately the 21st or 22nd), Mares and Cruz were alone in Mares' car outside a party when Cruz asked Mares if he remembered "the killing of the little girl in Naperville." (R. 5203-5204) Mares said that he had in fact heard about the murder and Cruz said, "Chuck, don't tell nobody [sic] but I was there and—but I didn't kill her." (R. 5204, 5205) Mares asked, "[h]ey, man, are you serious and is this a joke or are you serious." (R. 5206) Cruz responded, "[n]o, I am serious." (R. 5206) Mares told Cruz that he didn't want to talk about the crime or hear about it. He also told Cruz, "[y]ou know, don't be joking. It could put you in jail just for goofing off like that." Cruz repeated that he was serious and that he was there, but didn't kill Jeanine. (R. 5204) In describing Cruz's condition, Mares stated, "well, he wasn't laughing. He wanted me to pay attention to him, to listen to what he had to tell me." (R. 5206)

Cruz told Mares that Jeanine was taped and beaten. (R. 5209) He said that someone else, "beat the fuck out of her." (R. 5210) Cruz said that Jeanine was not raped or molested. (R. 5211) Mares thought that Cruz "had the guts" to commit the crime. (R. 5264-5265) Mares also tes-

tified that John Ruiz and co-defendant Buckley were his friends. (R. 5216-5218)

DuPage County Sheriff's Detective Thomas Vosburgh testified that on the morning of April 19, 1983, he and Detective Kurzawa spoke with Cruz at the Galena Hotel in Aurora. (R. 6421-22) Cruz stated that he knew Alex Hernandez and that he was aware of parties that occurred in the Eola Road area. (R. 6422) Vosburgh did not then, or at any other time, attempt to make Cruz a police informant. (R. 6431)

On May 9, 1983, Detective Vosburgh learned that Cruz wanted to speak with him. (R. 6422-23) Vosburgh picked up Cruz and drove toward the Sheriff Department offices. While on route, Cruz said that he had a vision earlier in the day. Vosburgh testified that Cruz, "kept telling me: It's not true." (R. 6425) Cruz also said that he did not want to believe that it had occurred. (R. 6426) In the vision, Cruz saw "the girl that was abducted out of Naperville." (R. 6425) Cruz indicated that the girl was dragged out of the house. (R. 6425)

Cruz further stated that Jeanine was hit so hard in the back of the head, "that it left an impression in the mud of where she laid." (R. 6420) Cruz also said that Jeanine was "violated sexually anally." (R. 6426) Cruz repeatedly asked Vosburgh whether the vision was true. (R. 6426)

Vosburgh drove Cruz to the police station, where they met Detective Kurzawa. Cruz then repeated his account of the vision. (R. 6427)

At that point the detectives placed a photograph of the crime scene face-down on the table in front of Cruz. They also placed a photograph of Jeanine face-up. (R. 6427) They then asked Cruz to look at Jeanine's photograph and he looked away, saying, "I don't want to look at it." (R. 6427-28) Vosburgh then said that he thought the other

photograph would depict Cruz's vision and show that it was true. Cruz again refused to look, and then "became emotionally upset and started to cry." (R. 6428) The detectives then left the room. (R. 6428)

Cruz later asked "to stay either at the Sheriff's Office or someplace where [the police] could put him because he was in fear of his life in Aurora." (R. 6429) The detectives arranged to let Cruz spend the night in the Sheriff's Office. (R. 6429-30)

Detective Dennis Kurzawa testified that on the evening of May 9, 1983, he had a conversation with Cruz. (R. 6482) Cruz stated that he had a vision in which he saw a little girl dragged from a house in a blanket. The girl was in a field and had been struck in the head so hard that it left an impression in the mud. Cruz also stated that the girl was violated anally. (R. 6483) Detective Kurzawa had not informed Cruz that the details of the vision corresponded with the details of the present crime. (R. 6483-6484)

On the following day Detective Kurzawa again spoke with Cruz. This conversation was tape recorded and the recording was transcribed. (R. 6508-09) The resulting transcript was marked prosecution exhibit 66.

At the conclusion of Detective Kurzawa's direct examination, the trial court instructed the jury:

> Statements received in evidence shall be considered by you only as they apply to the author of the statement. No other person or persons in this case are to be considered by you in any connection with any such statement.
>
> I just want to make sure that you do recall that limited instruction and state it for the record at this time.

In the tape recorded statement, Cruz stated that he had spoken with respondent between 30 minutes and an hour

earlier. (R. 6783) Respondent touched the back of Cruz's head and said, "[r]ight here, right here is where, bust her head, she got hit with that bat[.]" (R. 6783-84) Respondent said that man named Emilio had done something and then said "I just finished it 'cause [sic] I was getting blamed for it anyhow." (R. 6784) Hernandez went on to describe the house were Emilio lived. (R. 6785)

Cruz also said that he talked with Emilio, who said that he and Ray Oretga "were sniffing upstairs in this house" when Alex brought a girl up and said that Emilio could have sex with her. (R. 6786) Emilio knocked her out "in order to make love to her[.]" (R. 6786) The girl started yelling and fighting him and Emilio "beat her up real bad." (R. 6786) Emilio then hit the girl with a baseball bat, using such force that the bat broke. (R. 6797) Ray got upset and told them to take the girl away. He then kicked the girl down the steps. Alex picked her up, put her in a car and left. (R. 6787) Alex returned later and said that he got rid of the girl. (R. 6787) Ray said that "her nose was busted." (R. 6789) Cruz also told the police that the men were "sniffing paint." (R. 6791)

Stephen Ford testified that he was incarcerated in the Sheridan Correctional Center. (R. 6374) In November of 1983 Cruz and Stephen Ford were both in the DuPage County Jail and were assigned to the same tier. (R. 6375) During this time an incident occurred on the tier in which a man named Billy Wanders was sexually assaulted. (R. 6396) Neither respondent nor Ford was involved in the incident. (R. 6375) During a subsequent investigation, Cruz told Ford "that next time something like that happens, I'll just kill 'em and make sure there's no witnesses. . . ." (R. 6378) At the time of this statement Ford had known respondent for about a month and a half. (R. 6372)

A few days later Ford and Cruz had another conversation. (R. 6378) Cruz said that he had lived in some woods

near a street which divided Aurora from Naperville (R. 6382) and had moved from the area because something had happened and "[h]e had to get out." (R. 6382, 6387) Cruz further stated "[h]e had something out there." (R. 6386) Ford also recalled something about a piece of paper which, to the best of his recollection, involved, "something to the effect of some kind of—killing a girl out in Aurora. . . ." (R. 6383) Ford was unclear about this statement. (R. 6388)

In late May or early June of 1984 Cruz asked to speak with Lieutenant Robert Winkler, the second shift watch commander at the DuPage County Jail. (R. 6582-83) Winkler advised Cruz of his *Miranda* rights (R. 6594), and Cruz explained that two men approached him in February of 1983 and asked if he wanted to be involved in a burglary. (R. 6585) Cruz replied that he didn't want to be involved. The persons then asked to use his car to commit the burglary. Again Cruz said no, but agreed to show them how to hot-wire a car. (R. 6585)

Two days later the persons asked Cruz if he wanted to have sex with a little girl. (R. 6585) Again Cruz declined. (R. 6585-86) Cruz said that the girl was at the house of one of the persons. (R. 6586)

On June 6, 1984, respondent asked to speak with Lieutenant Robert Winkler. (R. 6574) Respondent stated that he wanted to talk about the case and Winkler responded that Hernandez was not required to say anything. (R. 6576) Respondent "sounded like he wanted to get something off his chest." (R. 6590) Winkler advised respondent of his *Miranda* rights and offered to let respondent make a telephone call. (R. 6576) Winkler also explained that he would have to make a report concerning anything said. (R. 6578) Respondent said that he trusted Winkler and explained that he and two other persons had planned to

commit a burglary at a specific house in Naperville. (R. 6579) The three persons drove to the area in a dark green, late model Lincoln Continental. (R. 6579) They drove around the area for a while when Hernandez lost his nerve and was dropped off some three blocks away. (R. 6579) A short time later the others returned and picked up Hernandez. (R. 6580) When respondent entered the car he saw a small girl and several items taken from the home. He described one of the items as a white coffee maker, similar to a "Mr. Coffee" machine. (R. 6580) The girl was frightened and said that she wanted to go home. Hernandez also stated that her lip was bleeding. (R. 6581)

On the next day, June 7, James Roberson, a Deputy Sheriff assigned to the DuPage County Jail, was assigned to transport Hernandez to court. (R. 6560) Respondent asked Roberson if he had spoken with Bob Winkler and then said, "I'm going to tell you what I got to say." (R. 6563) Roberson explained that he had no questions for respondent, who replied that he and some friends had planned to go to the Nicarico home in order to commit a burglary. (R. 6567-68) When they went to the house (R. 6565, 6567), they found a young girl and abducted her. The kidnapping was not prearranged. (R. 6568) Respondent went on to explain that, "[w]hen this had taken place, they [took] the young girl from the house with them to an unspecified place." (R. 6565) Respondent did not mention where this was, but said that they attempted to use her in order to get money. (R. 6567) Respondent said that when he left the scene the girl was alive. (R. 6565-66) Deputy Roberson asked no questions of Hernandez. (R. 6566)

FBI Special Agent Jeff Bogan testified that on March 16, 1983, he was at the DuPage County Complex when he was asked to "listen to some information being related by Alex Hernandez." (R. 6545) He went into a room where he met respondent and Tom Knight. (R. 6546, 6548) Agent Bogan did not recognize respondent at trial. (R. 6546)

Respondent stated that he was from Aurora and that, while on the way to visit a friend who lived in the area he saw a person known to him as "Ricky." (R. 6549, 6555) Respondent and Ricky were sitting in Ricky's car when Steve Buckley and Mike Castro approached and got in the car. (R. 6550) Respondent suggested that they go to the junior high school and "look at the women," and Ricky replied, "I don't like any fuckin women." (R. 6550) Ricky then said, "I didn't mean to kill that bitch." (R. 6550)

Respondent described both Ricky and the car that he drove, but said that he did not remember Ricky's last name. (R. 6551) Respondent also stated that Ricky had "a policeman's nightstick or baton" which Ricky normally carried in the trunk of his car. (R. 6551, 6552)

Respondent waived jury sentencing and his cause proceeded to a sentencing hearing before the court. (R. 10113) In sentencing respondent for murder, the trial court stated:

> The Court has carefully considered all of the evidence presented during the trial and the sentencing stages.
>
> Again, on your record, I also indicate this was a trial. It revealed a child age ten was taken from her home, sexually and physically abused in such a manner that words are inadequate, again, to describe. Even the pathologist, Dr. Cleveland, an experienced doctor, had difficulty making a description and referred to the force used in the injury as most difficult to describe.
>
> The trial also revealed that the victim was then discarded in an inhuman fashion, disposed in a manner that lacked compassion, let alone any showing of sympathy or consideration.
>
> Considering the charge of murder and the sentencing, I also in your situation have searched the record and considered all testimony and all factors present.

It is the finding of this Court that there are no mitigating factors such to preclude the imposition of the death penalty.

The Court, therefore, according to the law, sentences you to the death penalty. (R. 10669-10670)

REASONS FOR GRANTING THE PETITION

I.

A NON-TESTIFYING CO-DEFENDANT'S STATEMENT WHICH IS INTRODUCED AT A JOINT TRIAL DOES NOT FALL UNDER THE *BRUTON* EXCEPTION TO THE GENERAL PRINCIPLES GOVERNING CURATIVE JURY INSTRUCTIONS WHEN THE STATEMENT HAS BEEN REDACTED BY THE USE OF NEUTRAL TERMS SO THAT IT IS NOT FACIALLY INCRIMINATING.

This case involved the joint trial of three co-defendants charged with murder.

Prior to trial defendants moved to have the cause severed. Defendants based their motions on allegations that pretrial admissions by Cruz and Hernandez implicated other defendants. Following a series of hearings, the trial court denied the motions finding that a joint trial could be fairly conducted if the statements of declarant co-defendants were redacted to remove references to non-declarant co-defendants.

The cause proceeded to jury trial. Prior to jury selection, the trial court admonished the venire that the evidence against each defendant was to be kept separate. During the selection procedure, the court conducted preliminary questioning of each prospective juror and then allowed the parties to conduct individual questioning. Counsel for each defendant took full advantage of this op-

portunity. Nine (9) seated jurors were specifically questioned about their ability to keep the evidence against each defendant separate and each indicated they would have no problem doing so. [(Weinstock, R. 2166, 2227-28, 2298) (VanSlyke, 2198, 2199, 2298) (Garonfalis, R. 2394-95) (DeVaun, R. 2360) (Cisek, R. 2826-27, 2834) (Cruise, R. 2708-09) (Bolger, 3081, 3095) (Narro, R. 3002, 3015) (Langsworthy, R. 2900)]

At trial, all identification of Hernandez contained in the statements of co-defendant Cruz were removed and replaced with other terms. (Hernandez's statements were also redacted to remove Hernandez's references to Cruz.) The only exception occurred when Hernandez waived redaction of one statement implicating him along with Emilio Donatlon and Ray Ortega, two men who had nothing to do with the crime. Following crucial admissions by co-defendants Cruz and Hernandez, the trial court instructed the jury to consider the evidence only against the declaring defendant.

During closing argument, counsel for the prosecution and for each defendant admonished the jury to keep the evidence against each defendant separate.

At the conclusion of the trial, the court instructed the jury, in part, that:

> The law that applies to this case is stated in these instructions and it is your duty to follow all of them. You must not single out certain instructions and disregard others. (S.R. II at 2) (I.P.I. Crim. 1.01)
>
> You should give separate consideration to each defendant. Each is entitled to have his case decided on the evidence and the law which is applicable to him.
>
> Any evidence which was limited to one defendant should not be considered by you as to any other defendant. (S.R. II at 11) (I.P.I. Crim. 3.05)

> A statement made by one defendant may not be considered by you against any other defendant. (S.R. II at 12) (I.P.I. Crim. 3.08)
>
> You have before you evidence that a defendant made statements relating to the offenses charged in the indictment. It is for you to determine whether the defendant made the statements and, if so, what weight should be given to the statements. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made. (S.R. II at 13) (I.P.I. Crim. 3.06)

The jury indicated no difficulty in following the instructions and found co-defendants Hernandez and Cruz guilty as charged. The jury was unable to reach a verdict concerning the charges against co-defendant Buckley.

Nonetheless, the Illinois Supreme Court vacated the convictions.

The decision of the Illinois Supreme Court in this case misinterprets this Court's decision in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1020, 20 L.Ed.2d 476 (1970), and conflicts with this Court's recent decision in *Richardson v. Marsh*, ____ U.S. ____, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In addition, the decision aligns Illinois squarely on the wrong side of what petitioner respectfully suggests is a post-*Richardson* split among the Circuit Courts of Appeals regarding the substitution of neutral terms as a means of redacting statements of non-testifying co-defendants.

The opinion below is consistent with *United States v. Petit*, 84 F.2d 1546 (11th Cir. 1988) which holds that a confession which is not facially incriminating may still violate *Bruton*. *Petit* held that substitution of the word "friend" for defendant's name, when considered with the other evidence in the case, "sufficiently inculpated him so as not to fall under the clear exception to *Bruton* pro-

vided by the Court's decision in *Richardson.*" *Petit*, 841 F.2d at 1556. This view is inconsistent, however, with the decision in *United States v. Diaz*, 836 F.2d 385 (8th Cir. 1987), where the redaction was accomplished by substitution of the word "someone." In *Diaz* the Court of Appeals' analysis focused only on the face of the statement in finding that the redaction was sufficient.

The petitioner respectfully suggests that the Illinois Supreme Court and the United States Court of Appeals for the Eleventh Circuit have erroneously concluded that *Richardson* created a very narrow exception to *Bruton.* To the contrary, *Richardson* explained that *Bruton* is a very narrow exception to the general rule. In *Bruton*, this Court:

> [H]eld that a defendant is deprived of his Sixth Amendment right to confrontation when the *facially* incriminating confession of a nontestifying co-defendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the co-defendant.

Richardson, ____ U.S. ____, at ____, 107 S.Ct. 1702, at 1707, 95 L.Ed.2d 176, 186 (1987). (Emphasis supplied). Crucial to the decision in *Bruton* was the fact that, "the co-defendant's confession 'expressly implicat[ed]' the defendant as his accomplice." *Richardson v. Marsh*, ____ U.S. at ____, 107 S.Ct. at 1707, 95 L.Ed.2d at 186. [*See also United States v. Belle*, 595 F.2d 487 (3d Cir. 1979) (*en banc*).]

Although the Illinois Supreme Court recognized that the admissions of co-defendant Cruz were not explicitly inculpatory of respondent, the Court refused to apply an assumption that the jury could follow its instructions because the respondent was "plainly incriminated" by the prosecution's presentation of its case. *People v. Hernandez*, 121 Ill. 2d 293, 313, 521 N.E.2d 25, 34 (1988). The

Court concludes that the redactions "established 'friends' as a euphemism identifying the nondeclaring defendants." *Id.*[1] This conclusion, contrary to the reasoning of *Richardson, supra*, ignores both the spirit and the letter of a fundamental premise governing review of criminal cases.

There is an almost invariable assumption of the law that jurors will follow their instructions. In *Richardson*, this Court explained that a very narrow exception to this legal assumption was created in *Bruton, supra*, when a facially incriminating admission of a nontestifying co-defendant was introduced at a joint trial. *Ibid.* In such a case, this Court explained in *Bruton*, no jury could be expected to follow its instruction to limit the application of the statement.

In *Richardson*, this Court explained that the important distinction between that case and *Bruton* was that the redaction in *Richardson* was not incriminating on its face.

> There is an important distinction between this case and *Bruton*, which causes it to fall outside the narrow exception we have created. In *Bruton*, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. *Id.*, at 124, n. 1, 88 S.Ct., at 1621, n. 1. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." *Id.*, at 135, 88 S.Ct., at 1627. By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).

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[1] The petitioners also submit that the Illinois Supreme Court's conclusion that the prosecution misused the evidence of the co-defendant's statements during closing argument is not supported by the record. However, since resolution of that issue is not deemed necessary to a grant of certiorari, petitioners have chosen not to unduly lengthen this petition by addressing it.

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence.

Richardson, ____ U.S. at ____, 107 S.Ct. at 1707, 95 L.Ed.2d at 186.

In addressing the type of contextual linkage analysis undertaken by the Illinois Supreme Court in this case, this Court explained that:

> Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself. *Id.*, at 134, n. 10, 88 S.Ct., at 1626, n. 10. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The "contextual implication" doctrine articulated by the Court of Appeals would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so "powerfully incriminating" that a new, separate trial is required for the defendant. This obviously lends itself to manipulation by the defense—and even without manipulation will result in numerous mistrials and appeals.

Richardson, ____ U.S. at ____, 107 S.Ct. at 1708, 95 L.Ed.2d at 186, 187.

The fact that the names of co-defendants in this case were replaced with the words "friends" and "two named individuals" makes this case much more similar to *Richardson* than *Bruton*. It is true that there were three co-defendants who were friends. However, there was also evidence that defendants were friends with a large group of persons who were identified and inculpated in various

statements heard at trial. Indeed, the prosecution introduced evidence concerning nine "friends" or "acquaintances", some of whom were falsely implicated in the crimes committed against the victim. The presence and mention of those persons further eliminates the possibility that the jury would consider the redacted statements to be facially incriminating against defendant. Because the jury was required to utilize a linkage analysis, the Court's review should have begun with the presumption that the jury was capable of following its instructions.

The reasonableness of this approach is demonstrated by this case. If the jury in this case had been unable to follow the instructions, it would have convicted co-defendant Buckley as well as respondent. Because the jury did not convict Buckley based on the redacted statements, it is unreasonable to conclude that the jury was unable to follow the instructions given concerning statements made by Cruz and Hernandez.

Disallowing the redactions here chills a prosecutor's use of joint trials. In *Richardson*, this Court explained that:

> Joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years. . . . Many joint trials . . . involve a dozen or more codefendants. . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes . . . , that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.

Richardson, supra, ____ U.S. ____, ____, 107 S.Ct. at 1708, 95 L.Ed.2d at 187.

Under the Illinois Supreme Court's ruling, the prosecutor in this case now faces the dilemma of having to choose either to conduct separate retrials or to totally redact the statements. Presentation of the statements in a manner which removes all reference to participants other than the declarant, however, will only serve to confuse and mislead the jury. This is particularly significant in a case where, as here, a key theory of the prosecution involves a joint venture by multiple offenders. Courts should not require redaction to be so severe that it misleads the jury as to critical facts in issue.

The price of joint trial should not be the unnecessary suppression of truth. Juries can, and do, follow instructions. This Court should grant the petition for a writ of certiorari and clarify that the exception created by *Bruton* does not extend to cases where the defendant is implicated only through contextual linkage.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests this Honorable Court to issue a writ of certiorari to the Illinois Supreme Court to review that court's de-

cision which reversed respondent's conviction and death sentence.

Respectfully submitted,

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APPENDIX A

(No. 61679.—Reversed and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ALEJANDRO HERNANDEZ, Appellant.

Opinion filed January 19, 1988.—Rehearing denied April 5, 1988.

JUSTICE SIMON delivered the opinion of the court:

Ten-year-old Jeanine Nicarico was abducted from her home in Naperville on Friday, February 25, 1983; she was raped and murdered the same day. On March 6, 1984, the defendant, Alejandro (Alex) Hernandez, and two codefendants were indicted on charges of murder, residential burglary, home invasion, aggravated kidnapping, aggravated indecent liberties, deviate sexual assault, and rape, and they were tried together. The defendant and Rolando Cruz were convicted on all counts (except home invasion, which was nol-prossed on the State's motion) following a jury trial in the circuit court of Du Page County. The jury was unable to reach a verdict on identical charges against the second codefendant, Stephen Buckley. The defendant waived his jury right for purposes of the death penalty hearing, and a death sentence was imposed by the circuit judge. Execution of sentence has been stayed (87 Ill. 2d R. 609(a)) pending disposition of this direct appeal. Ill. Const. 1970, art. VI, §4(b); 87 Ill. 2d R. 603.

I

The victim was home alone on the day of the crime because she had not been feeling well. Patricia Nicarico, the victim's mother, worked nearby, and she came home around noon to fix lunch, returning to work half an hour

later. Patricia Nicarico last spoke with her daughter by telephone at about 1 p.m.; they discussed a television program the victim had been watching and whether Jeanine should write a letter to her grandparents. Two hours later, Kathy Nicarico, one of the victim's two older sisters, arrived home from school. She testified that the front door was ajar, the striker plate was on the ground and the molding from inside the door frame was almost totally torn off. Entering the house, she noticed that the television was on, but she could not find the victim. A partially written letter to the victim's grandparents was found in front of the television. According to the testimony of Kathy and her mother, there were signs of a struggle in the older sisters' bedroom; a blanket and top sheet were missing from Kathy's bed. Nothing else had been stolen although a television, video cassette recorder, jewelry box, and several articles made of silver were all in plain view.

Investigating officers testified regarding their examination of the Nicarico home. Fingerprints were lifted from inside the house, and a boot print was discovered on the front door just below and left of the latch. Two shoe prints, each with a different tread design, were found outside the living-room window. A fourth print was found inside a depression on the Nicarico lawn where a car tire had apparently ridden up over the curb and left an imprint. Two dogs and their handlers were brought in from the Lake County sheriff's police, and the handlers testified that their dogs tracked Jeanine's most recent scent from the front door, part way down the driveway, across the lawn and to the curb about eight feet from the tire track on the lawn.

Jeanine Nicarico's body was found two days later, in heavy underbrush approximately 45 feet off a hiking trail, known as the Illinois Prairie Path, between Eola Road and the East-West Tollway in Du Page County.

That portion of the Prairie Path ends where it intersects the Tollway approximately 1,500 feet north of where the victim's body was discovered. Investigating officers testified that the body was found lying face down on a slight incline. Approximately two feet up and to the left of her head there was a small, "head shaped" depression in the mud; blood was found in that depression. A small quantity of leaves and mud were adhered to the back of the victim's head, and the left side of her body was muddy. Her eyes were covered with a piece of towel which had been taped firmly to her head, and she was found wearing only her nightshirt, torn from the hem to the right armpit and pulled up over her shoulders. Patricia Nicarico testified that the victim had been wearing underwear, but her underwear—like the blanket and top sheet from Kathy's bed—was never found.

Dr. Frank Cleveland, the coroner of Hamilton County, Ohio, conducted a post-mortem examination. He testified that the victim died from at least five extraordinarily powerful blows delivered to the front and back of her head by a blunt instrument; each injury to the back of her head was characterized by a large laceration that became V-shaped at one end. All of the blows were delivered within a limited span of time, and each individually would have been fatal. The victim also suffered a broken nose, split upper lip and severely bruised lower lip, and there was a small bruise on her left shoulder. She had abrasions on the upper back sides of her legs which were inflicted either after her death or very shortly before as blood was redirected in reaction to her head injuries.

The autopsy revealed evidence that the victim had been raped and anally assaulted before her death, but a toxicologist from the Illinois Department of Toxicology testified that too little semen was recovered from the victim's body to be of evidentiary value. The Chief Toxicologist of the Illinois Department of Public Health testi-

fied that he examined the victim's stomach contents and determined that she died two to four hours after eating. Dr. Cleveland agreed with that judgment. Because the food in her stomach was consistent with what the victim's mother had prepared for her lunch on February 25, the evidence indicates that the victim was abducted, raped and murdered all within a span of one to three hours between 1 and 4 p.m. that day.

There were no witnesses to any of the crimes perpetrated against the victim, but two prosecution witnesses gave evidence as to their observations of events occurring on February 25 which might have been connected to the crimes. Joan Johanville had lunch with her husband at the couple's upholstery business, located in a garage next door to the Nicarico home. She left her husband at about 10 or 12 minutes past 1 p.m. to drive home, and just past the Nicarico home she had to bring her car almost to a stop to avoid colliding with a car driving down the center of the street in the opposite direction. Johanville described the car as an older, light-blue or white car with a great deal of rust on the lower body. She also testified that the only person she saw in the car was its driver and that she remembered his face for his "very creepy and scary" eyes.

At trial, Johanville identified Buckley as the driver. However, she described the driver to police and FBI agents shortly after the incident, and her description was of a man with no facial hair and wearing wire-rimmed "granny" glasses. It is undisputed that Buckley has never worn eyeglasses and that he had a mustache, wide ("mutton chop") sideburns reaching down to his mustache, and hair nearly down to his shoulders at the time. Nonetheless, Johanville was certain of her identification, explaining that she might have "transposed" the glasses onto Buckley's face from the face of someone she knew and who resembled Buckley.

Frank Kochanny, a highway maintenance engineer for the Illinois Tollway Authority, testified for the State. He said that he and a fellow worker were picking up trash alongside the east-bound lanes of the East-West Tollway between 2:45 and 3 p.m. when they saw a car driving parallel to the Tollway just south of the boundary fence. It was driving in an area west of Eola Road, near a "Coldwell Banker" billboard. The Prairie Path meets the south side of the Tollway west of Eola Road, and at the time a "Coldwell Banker" advertisement was located just west of where the Path intersects the Tollway. Kochanny testified that the car was driving west at roughly 10 miles per hour, and that approximately 20 to 25 feet from the sign the car did a three-point turn, heading back to the east at a relatively faster speed. When Kochanny stepped out of his truck for a better look, the car had disappeared. Kochanny described the car he had seen as a 1978 or 1979 green Ford Granada with a hubcap missing from the front driver's side wheel. He saw a single individual in the car, a white male with dark sunglasses and hair midway down his ears or shorter.

Dean Schmunk testified that he spotted a green, four-door Ford Granada on March 8, 1983, with a hubcap missing off the front right wheel; he noticed it because police had said they were looking for such a car in connection with the Nicarico case. Schmunk had only a brief look at the driver, but he testified that he recognized Buckley as the driver of the car when he saw Buckley's picture in the newspaper the following March. There is, however, no evidence that either Buckley or any of his family or friends owned a green Ford Granada. Nor did investigators discover any reported thefts of such a car during the time at issue.

The only evidence presented against the defendant consisted of his pretrial oral statements; there is no physical or eyewitness evidence linking him to the

crimes. The first of those statements testified to at trial was made by the defendant to his mother, Haydee Hernandez, within two weeks of the victim's death. Haydee testified that her son asked for her advice on what to do having heard a conversation in which someone he claimed not to know admitted his involvement in a murder. Haydee testified:

> "He [the defendant] said, 'Well, I was going down to passing the Jewel supermarket and I be invited by some friends to, if I want to drink a beer with them[,'] and he said, 'Yes.' He get inside of the car and they was drinking beer, somebody in the car said, 'I don't want to kill—I don't want to kill her.'
>
> ***
>
> And I told him [the defendant], 'But what you mean? What he mean?'
>
> He said, 'I don't know.'
>
> That's what he said, 'He don't want to kill her but he killed her because she started screaming.'
>
> ***
>
> I told him, if he knows, the guy.
>
> And he [the defendant] said, 'Well, I don't know him but he is a friend of, you know, the people that invite him to drink the beer with him.' "

On his mother's urging, the defendant spoke to his uncle, Wilfredo Estremera. Estremera testified that the defendant was riding in his car and they had just heard a radio news story about the case when the defendant said: " 'Uncle, you know what? I know the guy that killed the little girl in Naperville.' " According to Estremera, "I asked him for a name, if he knew the guy's name and he said, 'The guy's name was Ricky.' " The defendant said he did not know Ricky's last name, but he told Estremera that Ricky "is a white boy [who] hangs out in Aurora, and he is from Oswego." According to Estremera's testimony, the defendant related that "they were sitting one day in his friend's car and that

his friend was drunk and he was high and he just came out and told [the defendant] he had killed the little girl."

The defendant also told Estremera that he did not want to call the police because he was afraid of getting killed; he said that the person responsible for the victim's death had also committed a crime in Aurora known as the "Frosty Mug" murder. Estremera told a co-worker, however, and the co-worker contacted the FBI. Tracing the call back to the co-worker and Estremera, Du Page investigators eventually contacted the defendant on March 10, 1983.

When contacted on that date by Du Page County sheriff's police detective John Sam, the defendant agreed to be interviewed but at first denied any knowledge of the crimes. After 10 or 15 minutes, he related that he was sitting in a car with Stephen Buckley, Mike Castro and a third man, who was telling a story of how he had killed a girl in Naperville. The defendant referred to the confessing man first as Ricky from Oswego and later in the conversation as Ricky Benevides.

Special Agent Jeff Boggan of the FBI testified that on March 16 he was present when the defendant made a statement recounting "Ricky's" participation. The defendant said he was sitting in Ricky's car drinking beer with Mike Castro, Stephen Buckley and Ricky, whose last name he said he did not know. During the conversation the defendant suggested that they all go to the junior high school and "look at the women." Ricky said he did not want to go, and then he added that he had not meant to "kill that bitch." The defendant told Agent Boggan that Ricky carried a nightstick in the trunk of his car.

Investigating officers arranged for the defendant to meet a friend of his, Armindo Marquez, Jr., who was incarcerated in the Kane County jail on charges of residential burglary. Marquez testified that he brought up the

subject of the Nicarico murder after a few minutes of casual conversation with the defendant, at which point the defendant made the following admissions:

> "He [the defendant] said that—he said his partner drags the girl out of the house by her ankles. *** He said he had dropped his partner off, went around the block once and pulled up in the driveway, that's when he saw him pulling this girl out by her ankles."

Marquez testified that the defendant had said he noticed the Nicarico's black nightlight and that it bothered him, though he did not know why. The victim's father testified that a nightlight like the one Marquez said the defendant described to him was located in front of the house. Marquez also testified that the defendant at first claimed that some diamond rings were stolen from the Nicarico home during the abduction, but the defendant later contradicted himself and said no property had been taken.

The defendant told Marquez, according to the latter's testimony, that they took the victim to an abandoned house and killed her because she was making too much noise. "So then he [the defendant]—he used something to tie her eyes with and then he held her and the other guy hit her" with a club or bat. After that, "[s]he was dumped and stomped on the back of her head." Du Page and Kane County officers took the defendant and Marquez in search of the abandoned house on two separate occasions, but it was never found.

Marquez testified that in his presence the defendant identified a picture of Ricky Byrnes as the subject of his "Ricky" statements. After the officer displaying that photograph left, the defendant told Marquez that Byrnes was not really involved. According to Marquez, the defendant first said he did not know the perpetrators' real names. The defendant later said he did, but that if he revealed their names he would be shot.

Jackie Estremera, the defendant's cousin, testified that he had a conversation with the defendant in October 1983 in which the defendant claimed to have participated in the crime. Jackie Estremera testified:

> "He was telling me, he said he knew who did it, the person that did it was in Kane County or he was telling me that the person that did it was in California or he was the driver or another person was the driver. He was just confused, that's all."

Jackie Estremera testified that the defendant told him that they had planned to burglarize the home, and that the defendant drove.

> "They went out, he says he never came out of the car, they went up, they went to the house and—
>
> ***
>
> Well, they knocked the door down, they kicked it in. He heard, he said he heard—he had heard it from his friend and then he said the person who did it was in California. ***
>
> Q. [PROSECUTOR] And what, if anything, do you recall at that time, Alex Hernandez telling you as to why they took the little girl?
>
> A. Yes, because she—they didn't want her, the little girl, to recognize them if they were taking her down to the police station and showed pictures."

Jackie testified that the defendant asserted "he wasn't going to say nothing unless he got [reward] money."

While in the custody of Du Page County sheriff's police on June 6, 1984, the defendant made a statement to Lt. Robert Winkler, watch commander at the Du Page Correctional Center, in which he said that he and two other individuals planned to burglarize a house in Naperville. They drove to the house in a late model dark-green Lincoln Continental, but the defendant lost his nerve on the way and was let out of the car three blocks from the Nicarico home. He told Lt. Winkler that he was picked up a short time later, and when he stepped into the car

he saw the victim and proceeds from the burglary, including an automatic coffee maker. The defendant said he noticed that the girl had a split lip and was scared. He claimed to have been let off at home while the victim was still alive and to have never seen her again.

Deputy James Roberson, a county jailer, testified that the defendant told him a different story the next day. The defendant told Roberson that:

> "himself and some friends went to the Nicarico home to burglarize the home.
>
> And when this had taken place, they had taken the young girl from the home with them to an unspecified place. He didn't mention where they had taken the young girl. And that they had used the girl, tried to get money for the girl.
>
> ***
>
> He stated that when he had left the young girl was still alive at the time."

During the State's case in chief it was stipulated that the defendant testified before the special grand jury in July 1983. The prosecutor read a portion of that testimony to the jury at defendant's trial.

> " 'Question: Why don't you tell the truth, the whole truth and nothing but the truth?
>
> Answer: I am telling you. I can't tell you any more. What else, you want me to create some other lies? That is all I have done.
>
> Question: That is all you have done?
>
> Answer: That is all, is created lies since the beginning.
>
> Question: Try telling the truth.
>
> Answer: Because I wanted the [reward] money, see, I am trying to do—I made the whole damn thing up. I wanted some damn money. That is, you know, I lied, and look where the lies got me to, possibly murder, which I never even did or had anything to do with.
>
> ***

> I am just trying to tell you I lied. You know, so when it is hard, when you don't have a place to stay, especially in the winter. When you have to stay in the car outside.' "

There was evidence that the defendant had been to parties held on that portion of the Prairie Path which extends from Eola Road to the Tollway. The State also elicited evidence that a year and a half before the crimes the defendant had been seen in possession of a nightstick.

The physical evidence is not probative of the defendant's guilt. While investigators found numerous fingerprints in the Nicarico home, eight prints suitable for identification remained unidentified after eliminating the prints of family and frequent guests, and none could be matched to any of the defendants. Furthermore, there is testimony to indicate that police officers seized and presumably examined all of the defendant's clothes and shoes. There was, however, no evidence submitted by the State to suggest that it discovered blood on any of the defendant's clothes or shoes, or that his shoes matched any prints found on the Nicarico property or near the body.

Therefore, apart from the "Ricky" statements, which are not inculpatory on their face, the only evidence tending to establish the defendant's complicity are his four statements to Marquez, Jackie Estremera, Lt. Winkler and Deputy Roberson. Each of those statements contain widely varying accounts of the crime and inconsistencies with the known facts. The record discloses additional statements made by the defendant which were not admitted at trial. Those statements contradicted the four which the State did submit, and they named other alleged participants—Scott McClain, Ray Ortega, Emilio Donatland, "Claudino" and "ToTo"—whom there is no reason to believe to have been involved.

The defendant has highlighted several discrepencies between his statements admitted at trial and the State's evidence. According to the State, Buckley was the driver and the victim was murdered where she was found. Marquez testified, however, that the defendant claimed to have driven the car and to have participated in murdering the girl in an abandoned house. Evidence presented at trial established that the defendant had never held a driver's license or been allowed by his parents to drive any of the family's cars or trucks. (Jackie Estremera testified, however, that he had seen the defendant drive automobiles.) The defendant purportedly told Marquez that the car was parked in the Nicarico's driveway, but the State's evidence indicates that the victim was put in a car at curbside. Moreover, there is no support for contentions in several of the defendant's statements that the victim had been abducted for the purpose of obtaining a ransom and that a coffee maker, diamond rings and other "proceeds" had been stolen from the Nicarico home. Finally, we note an apparent discrepancy, not mentioned by the parties, between the murder weapon, which Marquez said the defendant described to him (a bat or club) and which the defendant attributed to "Ricky" (a nightstick), and Dr. Cleveland's testimony that the blunt instrument with which the victim was bludgeoned left lacerations which were V-shaped at one end.

To explain the defendant's statements, counsel's theory of defense was that his client had invented the "Ricky" stories in order to obtain the well-publicized $10,000 reward which was being offered. Evidence of that intent is manifest in the defendant's admission to Jackie Estremera that he was not going to tell the police anything until he received reward money. Moreover, it is undisputed that the defendant was shown boxes full of money by officers investigating the case and promised

not only payment of a reward, but also employment opportunities in return for more detailed information. During cross-examination by the defendant's attorney, Deputy Sam testified:

> "Q. Did you explain to Alex that the procedure on payment of reward being leading to the—information leading to the apprehension and conviction before a reward is paid?
>
> A. Yes.
>
> Q. Did you tell him the reward was at $10,000?
>
> A. I believe so.
>
> Q. Did you or anyone in your presence ever tell Alex that if his information was true, he would get the $10,000 reward and you would help him get a job or that the police would help him get a job?
>
> A. I believe so.
>
> Q. Was Alex ever shown a box full of money?
>
> A. Yes."

And the following colloquy took place during cross-examination of Armindo Marquez:

> "Q. Did you tell Alex you knew who killed the little boy from Bolingbrook?
>
> A. Yes.
>
> Q. Did you tell Alex you can get a reward for the information you knew about the Bolingbrook murder?
>
> A. Yeah.
>
> Q. Did Alex tell you he was looking for the reward on the Naperville murder?
>
> A. Yeah, he wanted the reward.
>
> Q. And while you were there, did the police show Alex and you a box full of money?
>
> A. Yeah."

The defendant argues that the unreliability of his statements is heightened by his near mental retardation. In testimony uncontradicted by the State, Dr. Ralph Mesenbrink indicated that he tested the defendant's I.Q. The defendant's score, which was consistent with the

score his records show him having obtained in several examinations since he was eight years old, placed the defendant in the "dull-normal" range, "which was formerly called the borderline mentally retarded range." Dr. Mesenbrink expressed his opinion that the defendant's personality includes a "tall-tale telling quality."

Defense counsel has also attacked the credibility of Jackie Estremera and Marquez, claiming that their testimony must be discounted because they had reasons to fabricate the defendant's inculpatory admissions. Estremera faced possible felony contempt sanctions for having failed to appear as ordered before the special grand jury investigating the Nicarico murder, and the defendant contended that Estremera concocted the defendant's confession because he feared spending time in jail. Marquez, on the other hand, was already in jail charged with multiple counts of residential burglary. Although he had prior burglary convictions and there was reason to believe that Marquez was responsible for at least 100 unsolved burglaries in Kane and surrounding counties, the Kane County State's Attorney's office recommended a minimum sentence in exchange for a guilty plea. Defense counsel introduced a portion of the transcript from Marquez' sentencing hearing held in June 1983, where the assistant State's Attorney, Thomas Sullivan, said:

> "I might comment at this time that this recommendation of four years, which is the minimum for residential burglary, Mr. Marquez, is based primarily upon your cooperation with the police, specifically Detective Atchison and also Assistant State's Attorney Tom Knight of Du Page County, who also recommended that your case be viewed with leniency. Otherwise you would not be offered this four-year sentence."

As a witness for the State in this case, Assistant State's Attorney Sullivan denied that Marquez ever requested consideration of his cooperation with Du Page County

prosecutors in the Kane County proceedings, and he testified in response to the prosecutor's inquiry: "No, Mr. Knight, you never spoke to me directly about that."

It is, however, unnecessary to consider the impact of these arguments on the question of whether the defendant's convictions may stand affirmed. We find, as explained below, that the defendant did not receive a fair trial in that statements made by Cruz, and admitted at trial, inculpated the defendant because they were improperly and insufficiently redacted. The defendant was, therefore, implicated by a witness whom he had no opportunity to confront and cross-examine, a violation of this court's precedents and an error of constitutional magnitude. As a consequence, his convictions must be reversed.

II

Prior to the commencement of trial, the defendant and his codefendants made multiple motions for severance and then for separate juries after the severance motions were denied. The defendant argues that those motions were improperly denied, and that as a result statements made by Cruz were admitted at trial over objection and with insufficient redaction to protect the defendant's right to confront and cross-examine witnesses against him, a right guaranteed by both the State and Federal constitutions. (*People v. Johnson* (1987), 116 Ill. 2d 13, 28; *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. See *People v. Buckminster* (1916), 274 Ill. 435 (anticipating *Bruton* on the ground that the defendant is deprived of his right to a fair trial).) Under *Bruton* and *Buckminster* the out-of-court statement of a nontestifying codefendant is inadmissible in a joint trial unless all references to the nondeclaring defendants have been redacted.

Daniel Fowler, Ramon Mares and Lt. Winkler testified to three oral statements made by Cruz. The defendant claims that through their testimony Cruz' statements were admitted at trial with improper redactions because the names of the defendant and Buckley were replaced with code words which the jury understood to implicate the defendant. He argues that a substantial amount of evidence was admitted to prove that the three defendants were all friends (including two witnesses who were called solely to testify that the defendants were friends) and that they lived in Aurora. Therefore, he claims, redaction of Cruz' statements to replace names with "friends," "friends *** [from] Aurora" and "named individuals" was plainly insufficient since the jury had been told that the defendants were friends who lived in Aurora. Furthermore, the defendant contends that jurors were tipped off by the prosecutors that statements made by Cruz and the defendant had been redacted, causing jurors to be much more sensitive to the use of code words identifying the nondeclaring defendants.

Daniel Fowler, who knew Cruz and said he disliked him, testified that he was alone with Cruz one day in the spring of 1983 when Cruz brought up the topic of the Nicarico killing and said he knew who had done it. During examination by the State, Fowler testified:

> "A. He [Cruz] just said they [the people who committed the crimes] were friends of his.
>
> Q. Did he say where they were from?
>
> A. Aurora."

Defense counsel's objection was overruled.

A second instance of allegedly improper redaction occurred in the testimony of Ramon Mares, a distant cousin of Cruz. During his examination by the State there was the following colloquy:

> "Q. Just without mentioning any names of anybody, just mentioning whether he [Cruz] said anything else

about she was molested [*sic*] other than the fact he didn't rape her?

MR. JOHNSON [Buckley's counsel]: Your Honor, I am going to ask to be heard, not at this time.

THE COURT: All right.

BY THE WITNESS:

A. That a friend was there and that he knew—he knew also.

MR. JOHNSON: Objection, your Honor. Now I ask to be heard, right now.

THE COURT: Objection sustained and the last answer will by stricken.

The jury is instructed to disregard it.

MR. KNIGHT [Prosecutor]: I believe that is all I have of the witness."

The final instance allegedly prejudicing the defendant's rights occurred during Lt. Winkler's testimony of a statement Cruz made to him while incarcerated in the Du Page County jail.

"He [Cruz] stated that on the day—he was approached one day in February of '83, and that some friends of his asked him if he wanted to be involved in a burglary, be involved in it. And he said no, he didn't want to.

And they told him that they had a problem. They didn't have a vehicle, and they would like to know if they could borrow his vehicle to use in the commission of this felony.

And he stated, no. However he would then assist them in how to hotwire a vehicle. Then they could gain possession of a vehicle to use.

* * *

The named individuals then approached him, as he stated, two days later and asked him if he wanted to have sex with a little girl.

* * *

He stated that the little girl was at the residence of one of the named individuals."

The State argues that use of the words "friends" and "named individuals" sufficiently protected the defend-

ant's rights because there was no direct reference to him in those three witnesses' testimony recounting Cruz' admissions. This court has recently reiterated, however, that "[a] codefendant's confession or admission does not have to expressly state that a defendant was involved in an offense; it is enough if incriminating implications clearly point to the defendant's guilt." (*People v. Duncan* (1987), 115 Ill. 2d 429, 443.) To determine whether "incriminating implications" arose from the codefendant's admission, "it is proper to consider the statement in light of the State's other evidence" (115 Ill. 2d 429, 443), as well as the prosecutor's arguments and comments before the jury.

The defendant does not claim that this is a case of "contextual implication" like that recently decided by the Supreme Court in *Richardson v. Marsh* (1987), ___ U.S. ___, 95 L. Ed. 2d 176, 107 S. Ct. 1702, so this case does not present the question of whether *Richardson* will affect Illinois law as defined by *Duncan* and its predecessors. In *Richardson* the codefendant's confession was edited to remove not only the nondeclaring defendant's name, but also the facts of her existence and role in the crime. After redaction, the codefendant's confession disclosed that he had held an incriminating conversation with an unapprehended suspect while driving to the scene of the crime. The defendant's testimony placed her in an automobile with her codefendant when, according to the latter's redacted confession, the incriminating conversation took place. On appeal, the defendant contended that she had been improperly implicated by the codefendant's confession when placed in the context of her own testimony, even though the codefendant's confession was devoid of any reference to a third person's presence during the codefendant's incriminating conversation with the unapprehended suspect. Expressly limiting its ruling to instances where "the confession is

redacted to eliminate not only the defendant's name, but any reference to her existence," the Supreme Court found no *Bruton* violation. ___ U.S. at ___, 95 L. Ed. 2d at 188, 107 S. Ct. at 1709.

In the present case, however, the defendant claims that the redaction of his name from his codefendant's admissions was so poorly done that the jurors knew those admissions referred to him. The context is important to the defendant's allegation of error not because of interlocking evidence like that in *Richardson*, but because it established "friends" as a euphemism identifying the nondeclaring defendants. The *Richardson* majority specifically pointed out that it was "express[ing] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun" ___ U.S. at ___ n.5, 95 L. Ed. 2d at 188 n.5, 107 S. Ct. at 1709 n.5, as was done in this case.

The defendant here was plainly incriminated by the reference to "friends" not only because of the State's repetitive attempts to establish friendship but also by the prosecutor's closing argument, in which he linked the "friends" evidence to admissions made by Cruz and the defendant:

> "[T]he evidence is clear that Cruz and Hernandez are both acquainted with Buckley. If Buckley kicked the door in, all right. *What does that tell you about those admissions they made? Not only are they friends—*
>
> MR. JOHNSON: Objection, your Honor. I object to that as contrary to law.
>
> •••
>
> THE COURT: So far, it's proper argument. May continue.
>
> MR. KNIGHT: You've seen that they're friends. They live in the same neighborhood. They're all in the same proximity with respect to the victim's home. And I'm using it only in the direction of Cruz and Hernandez be-

cause the fact is they've made statements which are directed as admissions against them.

Okay. But they're also friends of Buckley's.

MR. JOHNSON: Objection, Judge. That inference is improper.

THE COURT: Confine—

MR. KNIGHT: This is only—

THE COURT: Confine it to the evidence now and relate it in that fashion.

MR. KNIGHT: This is only to Cruz and Hernandez I'm talking about. Okay. *They're friends. They're neighbors. Therefore, when they make admissions that they've committed this crime, it's much more—*

MR. JOHNSON: Objection.

THE COURT: Objection sustained.

MR. WESOLOWSKI [defendant's counsel]: It's improper." (Emphasis added.)

The State claims that Cruz had many "friends" and that redaction to "friends" was proper because it did not sufficiently identify or point to the defendant. According to the State, a defendant's right to confront and cross-examine witnesses against him is breached only if the nontestifying codefendant's admission, as presented to the jury, explicitly names the defendant as a participant. Substitution of any word for the defendant's name would, the State's argument suggests, cure any potential *Bruton* and *Buckminster* errors regardless of whether the word chosen identified the defendant as plainly as his surname. That is an argument previously rejected by this court in no uncertain terms. In *People v. Hodson* (1950), 406 Ill. 328, a character of the alphabet was substituted for the defendant's name, and this court reversed the conviction. "The mere substitution [with] a letter *** could not have deceived anyone as to the identity of the person mentioned in the confessions of Hodson's codefendants." (406 Ill. 328, 333-34.) Similarly, this court held that the State made a mere "pretense" of

complying with *Buckminster* by substituting "Blank" for the defendant's name in *People v. Johnson* (1958), 13 Ill. 2d 619, 623-24.

In *Alexander v. State* (Tenn. Crim. App. 1977), 562 S.W.2d 207, prosecutors offered the same answer when faced with a challenge to the use of "friends" in a redacted admission: "The State contends that the *Bruton* violation was cured by substitution of the phrase 'my friend' for Alexander's name each time it appeared in [the codefendant's] statement. This argument is supported, rather lamely we think, by the proposition that the term 'my friend' could apply to any one of many people who were in fact [his] friends." The Tennessee court rejected that argument, as do we, noting that "there could be little or no doubt in the jurors's minds that the reference to 'my friend' *** was in fact a reference to Alexander." 562 S.W.2d 207, 209. See *People v. Bell* (1969), 32 A.D.2d 781, 781-82, 302 N.Y.S.2d 946, 948 ("It is apparent that, despite the trial court's attempt to accomplish an effective redaction of the confessing defendant's statements, the jury could not help but conclude that the 'friends' of Bell were in fact the codefendants").

Use of "friends" in redacted statements was not limited to those three circumstances previously quoted, notwithstanding the trial court's directions that "friends" was not to be used in redacting the admissions. Statements made by the defendant and properly admissible against him were also edited, and references to the codefendants were replaced with "some friends" in the testimony of Sgt. Roberson and "two other named individuals" in Lt. Winkler's. No imagination was required for the jurors to conclude that when Lt. Winkler referred to "two other *named* individuals" in recounting the defendant's statement, the "two other *named* individuals" were the two codefendants seated next to the declarant.

It was equally obvious that when Lt. Winkler testified that Cruz told him he was approached by "[t]he *named* individuals" and asked "if he wanted to have sex with a little girl," Cruz had referred to the defendant.

Aggravating the effect of those improper redactions was the State's disclosure to the jury that they were not hearing the full story. Twice the jury was informed during direct examination of State witnesses that the admissions being testified to had been redacted. As quoted above, the prosecutor asked Ramon Mares to continue his testimony "without mentioning any names of anybody." Also in the jury's presence the prosecutor told his witness Jackie Estremera that "I am going to ask you a series of questions about that conversation, but as I ask you those questions *** do not mention the name of any other person to whom he [the defendant] referred." Thus, this case presents the same question posed in *Hodson* and *Johnson* because here, as there, it was obvious that the codefendant's statements had been altered to remove the names of nondeclaring defendants. Informing jurors that a codefendant named other guilty people but that those names are being withheld is, by itself, grounds for a mistrial. *United States v. Danzey* (2d Cir. 1979), 594 F.2d 905, 917.

On notice that the defendants' admissions were being edited, it was not difficult for the jurors to recognize the connection between the prosecutors' repeated elicitation of testimony that the three defendants were friends, and the use of "friends" in testimony regarding statements made by Cruz and the defendant. Furthermore, during the questioning of Daniel Fowler, the State purposefully inquired whether the "friends" Cruz spoke of were from Aurora. As the jury was informed, all the defendants were from Aurora, and it is difficult to attach any intention to the prosecutor's inquiry other than to establish in

the jurors' minds that Cruz was referring to the defendant in his statement to Fowler.

Making the use of "friends" all the more prejudicial to the defendant's rights is the fact that in two of the unredacted statements Hernandez was not even named. Cruz did not give Fowler any names, and he mentioned only Buckley to Mares. Thus, the statements were more prejudicial to the defendant than if they had not been redacted at all, yet the statement given to Mares had to be altered to preserve Buckley's rights in the joint trial. As this court ruled in *People v. Clark* (1959), 17 Ill. 2d 486, an unfair trial results where a codefendant's statement is admitted which, although not directly identifying the nondeclarant defendant in its unedited form, nevertheless implicates the defendant indirectly. *People v. McVay* (1981), 98 Ill. App. 3d 708, 716.

In *Clark* the codefendant made an admission in which he said that he waited in the car while Odum and two individuals he did not know killed the victim. A police officer testified that the defendant admitted being with Odum and Rocky while Odum killed the victim and the codefendant waited in the car. Relying on *Hodson* and *Johnson*, this court reversed the defendant's conviction even though he had not actually been named in the codefendant's unredacted statement. The court reasoned that the defendant had been denied a fair trial since the codefendant's statement, in conjunction with other evidence presented, contained sufficient information to "advise the jury that the unnamed person was in fact the defendant." 17 Ill. 2d 486, 490-91.

The State argues that even if there was a potential for unfair prejudice by the admission of Cruz' statements, the trial court guaranteed a fair trial by giving limiting instructions advising the jury that statements by Cruz and Hernandez could be considered only against their authors. That is precisely the argument rejected by

this court in *Buckminster* and by the Supreme Court half a century later in *Bruton*. (See, *e.g.*, *People v. Clark* (1959), 17 Ill. 2d 486.) According to *Buckminster*, "[i]t would be difficult to imagine any evidence that would be more prejudicial" than inculpation of the defendant by a nontestifying codefendant. (*People v. Buckminster* (1916), 274 Ill. 435, 448.) To suggest that the jury disregard such explosive evidence is, in the words of Judge Learned Hand, a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." (*Nash v. United States* (2d Cir. 1932), 54 F.2d 1006, 1007; see *Bruton v. United States* (1968), 391 U.S. 123, 137, 20 L. Ed. 2d 476, 485, 88 S. Ct. 1620, 1628 ("we cannot accept limiting instructions as an adequate substitute for [the] constitutional right of cross-examination"); see also *Krulewitch v. United States* (1949), 336 U.S. 440, 453, 93 L. Ed. 790, 799, 69 S. Ct. 716, 723 (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury *** all practicing lawyers know to be unmitigated fiction").) Likewise, the trial court's ruling to strike Mares' reference to a "friend" could not undo the damage already done; as this court has previously warned, "it is practically impossible for the average juror to divest his mind of such testimony." *People v. Bolton* (1930), 339 Ill. 225, 229-30.

We hold, therefore, that under these circumstances the defendant was deprived of his constitutional right to confront a prosecution witness and, consequently, of a fair trial.

III

Notwithstanding his admissions, as relayed by the testimony of Jackie Estremera, Marquez, Lt. Winkler and Deputy Roberson, the defendant argues that there was insufficient evidence to prove him guilty beyond a

reasonable doubt and that he may not be retried. We have considered the defendant's contentions and disagree with his conclusions. See *People v. Taylor* (1979), 76 Ill. 2d 289, 309 (although reversing on other grounds, a reviewing court must consider a challenge to the sufficiency of the evidence).

Initially, the defendant claims that there was no independent corroboration of his varied statements and that independent physical evidence connecting him with the crimes is necessary for the State to obtain a conviction. Considering the absence of physical evidence and the requirement that "for a conviction based on a confession to be sustained, the confession must be corroborated" (*People v. Willingham* (1982), 89 Ill. 2d 352, 359), the defendant suggests that there was insufficient evidence to support a conviction.

This court has never required proof of physical evidence connecting a defendant to a crime in order to establish his guilt. (See *People v. Taylor* (1974), 58 Ill. 2d 69; *People v. Norcutt* (1970), 44 Ill. 2d 256.) Proof of the *corpus delicti* committed consistently with the defendant's admissions of guilt is all that the corroboration rule demands. As *Willingham* indicates, the corroboration requirement is satisfied by proving that the crime confessed to was in fact committed. (89 Ill. 2d 352, 358-59.) There is no doubt in this case, and the defendant does not deny, that the crimes charged were actually perpetrated.

It has also been argued by the defendant that the evidence properly admissible against him did not prove his complicity beyond a reasonable doubt. The defendant suggests that his statements regarding this case were lies invented to obtain the reward money, and that Jackie Estremera and Marquez were incredible witnesses because of their motives to fabricate. All of the defendant's arguments were aired at trial, however, and the

jury had an opportunity to observe the witnesses and reach a more informed judgment of their credibility than this court can achieve from reading the transcript of proceedings.

"[I]t is not the function of this court to retry the defendant" (*People v. Collins* (1985), 106 Ill. 2d 237, 261), and we cannot disregard the testimony of Jackie Estremera and Marquez merely because they might have had a motive to fabricate. Neither can the court hold the evidence to have been insufficient in light of the defendant's alibi that he was spreading gravel on his family's property with his brother and an unrelated man hired to perform that job. Unlike *People v. Evans* (1962), 24 Ill. 2d 11, and *People v. McGee* (1961), 21 Ill. 2d 440, this case does not present an instance in which multiple disinterested witnesses supported the defendant's alibi, and the jury in this case was not required to accept alibi evidence given by the defendant's family and their hired hand. (See *People v. Thomas* (1956), 7 Ill. 2d 278.) In sum, the prosecution's evidence is neither so strong as to make the State's multiple *Bruton* violations harmless error, nor so weak as to necessarily leave a reasonable doubt of the defendant's guilt (*People v. Collins* (1985), 106 Ill. 2d 237, 261) and prevent his retrial upon the identical charges.

For the reasons stated, the defendant's convictions are reversed and his sentences vacated. This cause is remanded to the circuit court of Du Page County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

APPENDIX B

SUPREME COURT OF ILLINOIS

Springfield, Illinois, April 5, 1988

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

* * * * *

No. 61679—People State of Illinois, appellee, v. Alejandro Hernandez, appellant. Appeal, Circuit Court (DuPage).

Petition for rehearing denied.

* * * * *